

No. 1-09-3112

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellee,) Cook County
)
 v.)
) No. 03 CR 8423
 CHRISTINA ORLANDO,)
)
)
 Defendant-Appellant.) Honorable
) Colleen McSweeney-Moore
) Judge Presiding.
)

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err in dismissing defendant's postconviction petition at the second stage of proceedings where defendant raised claims of ineffective assistance of counsel for failing to investigate and call a medical expert or handwriting expert, but did not attach valid affidavits from any proposed witnesses to her petition.

¶ 2 Defendant Christina Orlando appeals the second-stage dismissal of her petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). On appeal, she contends that the circuit court erred in granting the State's motion to dismiss her

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petition because she made a substantial showing that defense counsel was ineffective for failing to investigate and present expert medical testimony and expert handwriting analysis. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with the aggravated battery of her 28-month-old son, N.F., for allegedly shaking him and shoving him into an object. Following a jury trial, defendant was found guilty of aggravated battery of a child on evidence showing that she angrily shook N.F. and shoved him into the wooden portion of a futon after being awakened by him in the early morning hours of February 4, 2003, and was sentenced to 10 years' imprisonment. On appeal, this court affirmed defendant's conviction and sentence, holding that defendant had waived her claims that certain evidence had been improperly admitted and that counsel was not ineffective for failing to object to the admission of such evidence, and corrected the mittimus to accurately reflect her presentencing custody credit. *People v. Orlando*, No. 1-06-2236 (2007) (unpublished order under Supreme Court Rule 23). In doing so, we determined that the evidence at trial was not closely balanced where the expert testimony presented by the State showed that N.F.'s brain injuries were caused by violent shaking and defendant gave a statement to the police in which she admitted that she shook N.F. and forcefully shoved him against the wooden portion of a futon and that she knew her actions were wrong. *Id.* at 8-10.

¶ 5 On November 9, 2007, defendant filed a *pro se* petition for postconviction relief in which she asserted, *inter alia*, that defense counsel was ineffective for failing to cooperate with Dr. Shaku Teas and causing her to withdraw from the case and failing to obtain a handwriting expert

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to show that the signature on her statement to the police was partially forged. Defendant attached a letter she had received from Dr. Teas to the petition in which Dr. Teas related that she believed defendant had a good defense, but could not perform her duties as an expert in the upcoming trial and was withdrawing from the case because counsel had not provided her with photographs she had asked for and had not become educated about the medical issues in the case. Defendant also attached a report prepared by James L. Hayes, a forensic document examiner, in which he related that he had examined defendant's signature on page three of the four-page statement she gave to the police, compared it with her handwriting examples, and determined that she probably did not write a portion of her signature on page three of her statement.

¶ 6 The circuit court appointed counsel to represent defendant, and she amended her petition to include a signed report of consultation from Dr. Jonathan Arden, a board-certified forensic pathologist. Dr. Arden related in his report that he had reviewed N.F.'s medical records, the trial testimony, defendant's statement to police, and Hayes's report, and reached the opinion that the injuries sustained by N.F. were not caused by shaking. Dr. Arden disagreed with the diagnosis of shaken baby syndrome because N.F.'s injuries were more consistent with having been caused by a mechanism of impact, such as a fall. Dr. Arden explained that N.F. was significantly older than most children who are diagnosed with shaken baby syndrome and that his injury pattern was atypical for shaken baby syndrome where there was subdural hemorrhaging on only one side of his brain and it occupied enough space to press on the brain. Dr. Arden also explained that he would have expected N.F. to have become symptomatic more quickly following the injuries had they been caused by shaking.

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¶ 7 On April 24, 2009, defendant filed a supplemental petition incorporating the claims raised in her original *pro se* petition and asserting that counsel was ineffective for failing to adequately cross-examine the State's expert witness or call a medical expert who would have contradicted the findings of the State's medical expert. Defendant attached three articles and an appellate court case from Wisconsin, which all address shaken baby syndrome, to her supplemental petition.

¶ 8 On July 31, 2009, the State filed a motion to dismiss defendant's petition asserting that defendant had waived her postconviction claims by failing to raise them on direct appeal and that she had not attached supporting affidavits to her petition. The State also asserted that counsel was not ineffective where he provided Dr. Teas with all requested materials, Dr. Teas did not reach an opinion regarding N.F.'s injuries, and defendant admitted to signing the confession at trial.

¶ 9 On October 2, 2009, the circuit court granted the State's motion to dismiss, determining that counsel's performance did not fall below an objective standard of reasonableness and that defendant was not prejudiced by counsel's allegedly deficient performance. In doing so, the court found that the record indicated that counsel had retained a medical expert prior to trial, that it was reasonable to infer that counsel likely decided not to present the expert's testimony because it was unfavorable to defendant, and that defendant had admitted to signing her confession.

¶ 10 On October 23, 2009, defendant filed a motion to reconsider the dismissal of her petition and attached a signed and notarized affidavit from defense counsel in which he averred that he had not hired an expert witness to review the medical records relating to N.F. because defendant

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could not afford to hire one. Defendant asserted that counsel could have informed the trial court that she could not afford to hire an expert and asked the court for the funds to do so. The court then denied defendant's motion to reconsider, but redacted that part of its prior ruling in which it found that counsel had retained a medical expert and inferred that he had likely decided not to present the expert's testimony because it was unfavorable to defendant.

¶ 11

ANALYSIS

¶ 12 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in her original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). To be entitled to postconviction relief, a defendant must demonstrate that she has suffered a substantial deprivation of her constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Proceedings are commenced by filing a petition verified by affidavit in the court in which the conviction occurred (725 ILCS 5/122-1(b) (West 1996)) and may consist of as many as three stages (*People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006)). Dismissal of a petition is warranted at the second stage where, taking all well-pleaded facts as true, the defendant fails to make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). A circuit court's second-stage dismissal of a postconviction petition is reviewed *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 13 Defendant contends that the circuit court erred by granting the State's motion to dismiss her petition where she made a substantial showing that defense counsel was ineffective for failing to investigate and present expert testimony about the cause of N.F.'s injuries or expert

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handwriting analysis to show her confession was partially forged. To prevail on a claim of ineffective assistance of counsel, a defendant must show that her attorney's performance fell below an objective standard of reasonableness and that she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, (1984). A failure to make the requisite showing of either deficient performance or sufficient prejudice defeats a defendant's claim of ineffective assistance of counsel. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To establish deficient performance, the defendant must overcome the strong presumption that the challenged action might have been the product of sound trial strategy (*People v. Simms*, 192 Ill. 2d 349, 361 (2000)) and show that counsel's performance fell below an objective standard of reasonableness (*People v. Manning*, 241 Ill. 2d 319, 326 (2011)). To establish prejudice, the defendant must prove that there is a reasonable probability that the result of the trial would have been different but for counsel's deficient performance. *Simms*, 192 Ill. 2d at 362.

¶ 14 The State initially responds that defendant has forfeited her claim that counsel was ineffective for failing to investigate and present expert medical testimony because she did not raise it on direct appeal and it was evident from the record that counsel had not called a medical expert witness at trial. While a postconviction petitioner generally forfeits any claims that could have been raised on direct appeal, but were not (*People v. Scott*, 194 Ill. 2d 268, 274 (2000)), the waiver rule is relaxed where the facts relating to the claim do not appear on the face of the record (*People v. Blair*, 215 Ill. 2d 427, 451 (2005)). Here, defendant is relying on Dr. Teas's letter, Dr. Arden's report, defense counsel's signed affidavit, and the articles attached to her supplemental petition, which are not part of the trial record, to support her claim, and we therefore determine

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that she has not waived her claim by failing to raise it on direct appeal.

¶ 15 Defendant asserts that counsel was ineffective for failing to investigate and obtain a medical expert to testify regarding the cause of N.F.'s injuries because his decision not to do so was not valid trial strategy and she was prejudiced by that decision where such evidence would have shown that N.F.'s injuries were not caused by shaking. The State responds that counsel was not ineffective where he investigated calling an expert witness, retained an expert witness, and made a strategic decision not to call the expert at trial and defendant was not prejudiced by his allegedly deficient performance.

¶ 16 The record shows that on August 5, 2005, defense counsel informed the trial court that he was setting up an appointment with the defense's expert, Dr. Teas, to review photographs. On September 12, 2005, defendant filed a motion to continue the trial date asserting that Dr. Teas had informed the defense on September 3, 2005, that she was withdrawing from the case and that the defense had retained Bonnie Merkowicz of Esquire Medical Expert Review to help find an expert. Counsel then informed the court that the defense was close to hiring a new expert, but was having an issue with money, and on September 26, 2005, counsel informed the court that the defense had retained an expert and would have his report within two weeks. That report is not in the record and no further mention was made regarding an expert witness as the case proceeded to trial. In dismissing defendant's petition, the circuit court found that defense counsel had retained a medical expert and reached the inference that counsel likely decided not to present the expert's testimony because it was unfavorable to defendant. The court then redacted that part of its ruling after defendant filed a motion to reconsider to which she attached a signed and notarized affidavit

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from defense counsel relating that he had not hired an expert witness because defendant could not afford one. The record thus shows that although defense counsel investigated the possibility of hiring a medical expert, he ultimately decided not to hire one because defendant could not afford to do so.

¶ 17 Where the trial court determines that a defendant is indigent, it may order that funds be provided to pay for a necessary expert witness. 725 ILCS 5/113-3(d) (West 2006); *People v. Watson*, 36 Ill. 2d 228, 233-34 (1966). A defendant is entitled to such funds if she can establish that she is indigent and that an expert witness is necessary for an adequate defense regardless of whether she is represented by a court-appointed attorney. *In re T.W.*, 402 Ill. App. 3d 981, 991 (2010). As such, counsel could have requested the trial court provide funds for a medical expert if defendant could not afford to hire one, and we therefore determine that counsel's performance fell below an objective standard of reasonableness where his failure to obtain a medical expert was based on a misunderstanding of the law and was not the product of sound trial strategy.

¶ 18 The State also responds that defendant has not made a substantial showing that she was prejudiced by counsel's failure to retain a medical expert where she has not attached an affidavit from a proposed expert witness to her petition. To support a claim of ineffective assistance for failing to investigate and call a witness, the defendant must tender an affidavit from the proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). "Without such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided any information or testimony favorable to defendant." *People v. Johnson*, 183 Ill. 2d 176, 192 (1998). A statement must be sworn before an authorized person to be considered a valid affidavit, and a document

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that does not consist of a statement sworn to before a person who has the legal authority to administer oaths cannot be considered an affidavit. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002); *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 71. A petition may be dismissed at the second stage of proceedings where the petitioner fails to support her claim with a valid affidavit. *People v. Niezgod*a, 337 Ill. App. 3d 593, 597 (2003); *cf. Wilborn*, IL App (1st) 092802 at ¶ 71 (a petitioner's failure to notarize a supporting affidavit is not cause for summary dismissal of her petition at the first stage of proceedings).

¶ 19 The record shows that defendant has not attached a valid affidavit from a medical expert who would have testified on her behalf at trial to her petition. While defendant attached a signed letter from Dr. Teas to her petition, the document does not set forth any purported testimony by Dr. Teas and is not notarized. In addition, although the document from Dr. Arden that is attached to defendant's amended petition sets forth the nature of his testimony, is signed, and is titled "Affidavit and Report of Consultation," it too is not notarized. As such, we cannot determine whether a medical expert would have provided testimony favorable to defendant about N.F.'s injuries where defendant has not attached a valid affidavit to that effect to her petition and thus conclude that she has not made a substantial showing that counsel was ineffective for failing to investigate and present expert medical testimony.

¶ 20 Defendant further asserts that defense counsel was ineffective for failing to investigate and present expert handwriting analysis to corroborate her trial testimony that her signature on page three of her confession was partially forged. In support of this claim, defendant attached Hayes's signed report to her petition in which he related that he had determined that defendant

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probably did not write a portion of her signature on page three of her confession and that his conclusion could be demonstrated if he was allowed a reasonable time to prepare demonstration charts. The report, however, was not notarized, and therefore cannot be considered an affidavit for purposes of supporting defendant's claim that counsel was ineffective for failing to investigate and present a handwriting expert at trial. As such, we cannot determine whether such an expert would have provided defendant with favorable testimony at trial and thus conclude that she has not made a substantial showing that counsel was ineffective for failing to investigate and present expert handwriting testimony.

¶ 21

CONCLUSION

¶ 22 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.